IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC., POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC.,

Appellants,

v.

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

APPELLANTS' BRIEF

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Opinions Below

The opinion of Justice William M. Mackenzie of the Superior Court of the State of Rhode Island is not reported (R. 112-122). The majority and dissenting opinions of the Supreme Court of the State of Rhode Island, four judges participating, are reported in 176 A. 2d 393 (majority opinion, R. 130-136; dissenting opinion, R. 137-139).

Jurisdiction

In February 1960, Appellants, publishers of paperbound books distributed in Rhode Island, filed a petition to the Superior Court of the State of Rhode Island for a declaratory judgment pursuant to The Uniform Declaratory Judgments Act of Rhode Island (R. 1-9). In this petition Appellants prayed for judgment as follows:

A. Declaring that Resolution No. 73 (which created the Rhode Island Commission to Encourage Morality in Youth, of which Appellees are the members and executive secretary), as amended, violates the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island, and

B. Declaring that the acts and practices of Appellees in purported performance of their duties as members of the Rhode Island Commission to Encourage Morality in Youth, as alleged in such petition, have violated and violate the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Constitution of the State of Rhode Island and enjoining Appellees, their agents, servants and employees, from continuing those acts.

After a trial in the Superior Court of Rhode Island before Justice William M. Mackenzie, and the rendition by the Justice of his opinion (R. 112-122) a decree was entered on March 2, 1961 in said Superior Court (R. 123-125).

That decree, to the extent here pertinent, reads as follows:

> "Wherefore, it is hereby Ordered, Adjudged and Decreed:

1. That Resolution No. 73, as amended, is constitutional.

2. That the acts of the Respondents [i.e. the Appellees] in disseminating said notices concerning books and publications are hereby declared unconstitutional.

3. That Respondents, and each of them, their agents, servants and employees, and their successors in office, be and they are hereby permanently enjoined from directly or indirectly notifying book and magazine wholesale distributors and retailers that the Commission has found objectionable any specific book or magazine for sale, distribution or display; said injunction shall apply whether such notification is given directly to said book and magazine wholesale distributors and retailers, or any of them, either orally or in writing, or through the publication of lists or bulletins, and irrespective of the manner of dissemination of such lists or bulletins.

4. Nothing contained in this Decree shall be construed to impair, obstruct, restrain or in any way affect criminal prosecutions for violations of laws or ordinances" (R. 125).

Both sides appealed from the aforesaid decree to the Supreme Court of Rhode Island. Appellants from so much thereof as declared Resolution No. 73, as amended, to be constitutional (R. 126) and Appellees from the remainder thereof (R. 127-128).

The Supreme Court of Rhode Island by its majority opinion denied and dismissed Appellants' appeal, and sustained Appellees' appeal to the extent of reversing Orders Nos. 2 and 3 hereinabove quoted; it remanded the cause to the Superior Court for further proceedings for the

purpose of entering a final decree in accordance with said opinion (R. 136).

On January 18, 1962, the Superior Court of Rhode Island, as required by Rhode Island practice,* entered a final decree in accordance with the aforesaid opinion of the Supreme Court (R. 140-141).

The notice of appeal to this Court from such final decree was filed in the Superior Court of Rhode Island on March 16, 1962 (R. 142-144).

This Court noted probable jurisdiction by order dated June 25, 1962 (R. 145).

The statutory provision conferring on this Court jurisdiction of this appeal is Title 28, United States Code, Section 1257 (2).

Statute Involved

The statute here involved is Resolution No. 73 adopted at the January, 1956 Session of the Rhode Island General Assembly, as amended May 25, 1959 by Resolution No. 95 (sometimes referred to as S 444) of the said General Assembly.

Resolution No. 73 (Acts and Resolves 1956) reads as follows:

RHODE ISLAND

1102 JANUARY SESSION, 1956

No. 73 H 1000 Approved April 26, 1956

RESOLUTION creating a commission to encourage morality in youth.

Resolved, That a commission be and it is hereby created, consisting of 9 members to be appointed by the governor, one of whom he shall designate as chairman.

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* *Testa* v. *Katt*, 330 U. S. 386, 389 footnote 3 (1947).

Forthwith upon the passage of this resolution, the governor shall appoint 1 member to serve until the 1st day of March, 1957, 1 member to serve until the 1st day of March, 1958, 1 member to serve until the 1st day of March, 1959, and 1 member to serve until the 1st day of March, 1960, and 1 member to serve until the 1st day of March, 1961. During the month of February, 1957, and annually thereafter, the governor shall appoint a member to serve for a term of 5 years commencing with the 1st day of March then next ensuing and until his successor has been appointed and qualified to succeed the member whose term will then next expire.

Vacancies on said commission shall be filled for the unexpired term of the member or members being succeeded.

Any member shall be eligible to succeed himself.

Forthwith upon the passage of this resolution the commission shall meet and organize.

*[It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth as defined in sections 13, 47, 48 and 49 of chapter 610 of the general laws, as amended, and to investigate and recommend the prosecution of all violations of said sections 13, 47, 48 and 49 of said chapter 610, as amended.]

Said commission may employ such assistants, experts, and other personnel as may be necessary in the proper exercise of its duties hereunder.

The members of said commission shall serve without compensation but shall be allowed their necessary and travel expenses, and shall report annually during the month of January to the governor and the general assembly as to their activities and findings; and be it further

---

* Replaced by Resolution No. 95 appearing at page 6.

Resolved, That the general assembly shall annually appropriate such sum as may be necessary to carry out the purposes of this resolution; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated; and be it further

Resolved, That for the purpose of carrying out the provisions of this resolution for the period ending June 30, 1957, the sum of $10,000.00 be and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated; and the state controller is hereby authorized and directed to draw his orders upon the general treasurer for the payment of such sum, or so much thereof as may be required from time to time, upon receipt by him of proper vouchers duly authenticated.

Resolution No. 95 (Acts and Resolves 1959) amended the sixth paragraph of Resolution No. 73 to read as follows:

"It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in Chapter 11-31 of the general laws, entitled 'Obscene and objectionable publications and shows,' and to investigate and recommend the prosecution of all violations of said sections, and it shall be the further duty of said commission to combat juvenile delinquency and encourage morality in youth by (a) investigating situations which may cause, be responsible for or give rise to undesirable behavior of juveniles, (b) educate the public as to these causes and (c) recommend legislation, prosecution and or treatment which would ameliorate or eliminate said causes."

Questions Presented

1. Does Resolution No. 73, creating the Rhode Island Commission to Encourage Morality in Youth, as amended by Resolution No. 95, tend to suppress or inhibit the circulation of books in Rhode Island in violation of the First and Fourteenth Amendments to the Constitution of the United States?

2. Did the acts and practices of the Appellees, the members and executive secretary of the Rhode Island Commission to Encourage Morality in Youth, in purported compliance with the duties imposed upon them by Resolution No. 73, as amended, in notifying booksellers and chiefs of police that the Commission had found certain specified books to be objectionable for sale, distribution or display to youths under 18, tend to suppress or inhibit the circulation of books in Rhode Island, and did they in fact suppress such circulation of books in Rhode Island without judicial determination that the books so suppressed are obscene, in violation of the First and Fourteenth Amendments to the Constitution of the United States?

The Facts

The uncontradicted facts material to the consideration of the questions presented, as established at the trial, are as follows:

Appellants are publishers of paper-bound books, which for many years have been and are now being distributed in Rhode Island (R. 17, A. 9-10; 12-13).

Appellees are members of the Rhode Island Commission to Encourage Morality in Youth (hereinafter referred to as the "Commission"), except Appellee Albert McAloon, who is its executive secretary (R. 9, Appellees' Answer to Petition, par. 3; R. 52, A. 68).

Max Silverstein & Son (hereinafter referred to as "Silverstein"), of 2 Lancaster Street, Providence, for many years has been and is now the exclusive wholesale distributor for Appellants' books for about 70% to 75% of the State of Rhode Island, including all of the City of Providence. As such wholesale distributor, Silverstein distributes Appellants' books to retailers (R. 16, A. 25; R. 17, A. 9; R. 18, A. 16).

Shortly after the Commission began to function, Silverstein received a notice on the official letterhead of the Commission dated July 19, 1957, reading in part, as follows:

> "This agency was established by legislative order in 1956 with the immediate charge to *prevent* the sale, distribution or display of indecent and obscene publications to youths under eighteen years of age.
>
> The Commissioners have reviewed the following publications and by majority vote have declared they are completely objectionable for sale, distribution or display for youths under eighteen years of age.
>
> • • • • •
>
> *The Chiefs of Police have been given* the names of the aforementioned magazines with *the order* that they are not to be sold, distributed or displayed to youths under eighteen years of age.
>
> *The Attorney General will act for us in case of non-compliance.*
>
> *The Commissioners trust that you will cooperate with this agency in their work.* They fully realize the complexity of this problem but believe, in view of the need of strengthening our youths, improving family life and preventing un-social behavior, that the above-named publications are definitely objec-

tionable under Chapter 610* of the general laws as amended.

Another list will follow shortly.

Thanking you for your anticipated *cooperation*, I am,

Sincerely yours,

ALBERT J. MCALOON
Executive Secretary"

(Pet. Ex. 1; R. 49, 55-56) (Italics supplied.)

Under date of August 5, 1957, Silverstein received another notice from the Commission on its official letterhead reading, in part, as follows:

"The Commissioners by majority vote have declared that the following three magazines are objectionable for 'sale, distribution or display' for youth under 18 years of age.

• • • • •

We appreciate your *cooperation* in regard to the first list. If you have questions regarding the aims or methods of our Commission I suggest that you contact me at the above address.

Looking forward to *continued cooperation*, • • •"

(Pet. Ex. 2; R. 20, 57) (Italics supplied.)

Another notice received by Silverstein from the Commission (in 1958) reads as follows:

"The Rhode Island Commission on Youth, unanimously established by the Rhode Island legislature in 1956, is pleased to offer you these enclosures, namely, the law on obscenity, the amendment creating this Commission, and a list of the most recent

* Relating to obscene and objectionable publications, designated as Chapter 11-31 in Resolution No. 95.

publications found objectionable for 'sale, distribution or display for youth under 18 years of age'.

This list should be used as a guide in judging other similar publications not named.

Your *cooperation* in *removing* the listed and other objectionable publications from your newsstands will be appreciated. *Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department.*" (Pet. Ex. 11; R. 23, 76) (Italics supplied.)

Between August 1957 and the commencement of this action in 1960 Silverstein received some 35 other official notices from the Commission, each listing certain publications as having been found objectionable for "sale, distribution or display for youths under 18 years of age," and each notice ending either with "Thanking you for your past cooperation," or "Thank you for your cooperation," or "Thank you for your anticipated cooperation." (Pet. Ex. 3; R. 21, 58; Ex. 4; R. 21, 59; Ex. 5; R. 22, 60; Ex. 6; R. 22, 61; Ex. 7; R. 22, 62; Ex. 8; R. 22, 63; Ex. 10 (11 notices); R. 23, 65; Ex. 12 (11 notices); R. 24, 83-94; Ex. 13; R. 24, 95; Ex. 14; R. 24, 95; Ex. 15 (2 notices); R. 24, 96-97.)

An undated "News Letter" received by Silverstein from the Commission (Pet. Ex. 16; R. 25, 98-102) in or about December 1957 contains the following paragraph (R. 100):

> "Your Commission has reviewed 38 publications. They have found by a majority vote 32 to be totally objectionable for youths under 18. *The lists have been sent to distributors and police departments. To the present cooperation has been gratifying.*" (Italics supplied.)

Copies of each Commission notice were sent by the Appellees to the Police Departments of the various cities

and towns in Rhode Island (Pet. Ex. 1; R. 19, 55-56; and R. 38, A. 20).

Promptly after receipt from the Commission of each notice, Silverstein stopped selling the publications distributed by it which were listed on such notice and, in addition, instructed its field men to pick up all unsold copies from its retail customers. The unsold copies were then returned to the publishers (R. 25, A. 23-26). Silverstein took this action "rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply, * * *" (R. 25, A. 27). The testimony further shows that it was for the same reason—the desire to avoid being involved in "any court proceeding" with a "duly authorized organization" which had been "ordered by the State through a resolution"—that Silverstein agreed to "cooperate" with the Commission in its activities (R. 34, A. 66-67).

Shortly after the receipt from the Commission of such notices, Silverstein would be asked by a member of the Providence Police Department for a report of what had been done in connection with the publications listed on such notices. The police officer would ask information as to the number of copies originally received by Silverstein, the number that had been taken back from the retailers and the number that had been returned by Silverstein to the publishers (R. 26, A. 29; R. 26-28, A. 32-39).

In fact, many of the Commission notices contain notations made by Silverstein in pencil, indicating under the word "Draw" the number of copies of a publication received by Silverstein from the publisher and under the word "Ret." the number of copies returned by Silverstein to the publisher (R. 27-28, A. 34-39).

The Commission's Annual Report to the Governor and the General Assembly of Rhode Island dated January 1960 contains the following statements:

> "Thirty magazines and paperback pocketbooks were added to the previous list of publications found objectionable for youth under 18 by a majority vote of the Commission. This brings the total to 108.
>
> *The guide lists* (requested by chiefs of police, distributors and educators in 1957) of the type of publications deemed objectionable for youth under 18 *is still sent to all local distributors and chiefs of police* in Rhode Island, with the result that in the last six months our newsstands show a very *improved condition.*
>
> In most cases local distributors have been cooperative this year, *withdrawing publications* of the type listed in the Commission guide list and *returning them to publishers.*
>
> This Commission feels that the *guide list, Court action initiated by this Commission,* and the cooperation of the Attorney General's Department is largely responsible for the 'new look' on Rhode Island newsstands." (Resp. Ex. A; R. 48, 103-104) (Italics supplied.)

Commission notices list as objectionable the book PEYTON PLACE by Grace Metallious (Pet. Ex. 6; R. 22, 61, Pet. Ex. 11; R. 23, 76 and Pet. Ex. 16; R. 25, 98-101). The paper-bound edition of that book is published by Appellant Dell Publishing Company, Inc. (R. 18, A. 17). Another Commission notice (Pet. Ex. 14; R. 24, 95) lists as objectionable the book THE BRAMBLE BUSH by Charles Mergendahl. The paper-bound edition of that book is published by Appellant Bantam Books, Inc. (R. 18, A. 18).

Summary of Argument

There is no state power to restrict the dissemination of non-obscene books. Accordingly, no state may suppress any book until it has been found to be obscene. Such a determination, involving a constitutional issue, is one that must be made by a Court in accordance with the requirements of due process.

A state statute which empowers a state commission to promulgate to book wholesalers and retailers lists of books deemed by such commission to be obscene, and empowers the commission to recommend to the attorney general of that state the prosecution of persons for the sale of obscene literature, violates the First and Fourteenth Amendments to the Constitution of the United States. Such a statute tends to inhibit the circulation of books without prior judicial determination that such books are obscene.

Rhode Island Resolution No. 73, as amended, is such a statute, for it authorizes the Commission to "educate the public concerning any book • • • containing obscene, indecent or impure language, • • • and to investigate and recommend the prosecution of all violations of said sections, • • •" (i.e. the sections dealing with the sale of obscene material).

The coupling in the statute of the duty to "educate" with the power to "recommend" prosecution constitutes an implicit threat of prosecution if booksellers do not heed the Commission's "education" with respect to any particular book. Accordingly, the statute is unconstitutional on its face.

In addition, the activities of the Appellees under the statute are unconstitutional. The Appellees, by their notices sent to wholesale and retail booksellers in Rhode Island

and to the Chiefs of Police throughout the State, made explicit the implicit threat of prosecution contained in the statute. The inevitable result was the stoppage of sale of the books listed in the Commission notices, without determination by any court that such books are obscene.

ARGUMENT

I

NO STATE MAY RESTRICT THE DISSEMINATION OF BOOKS UNLESS AND UNTIL SUCH BOOKS HAVE BEEN FOUND TO BE OBSCENE BY A COURT IN ACCORDANCE WITH DUE PROCESS.

The dissemination of books is an integral part of freedom of the press and by virtue of the Fourteenth Amendment is safeguarded from invasion by state action (*Smith* v. *California*, 361 U. S. 147, 149-150 (1959).

While it is true that under *Roth* v. *United States*, 354 U. S. 476 (1957), obscene publications are not protected by the First Amendment, it is equally true that there is no "state power to restrict the dissemination of books which are not obscene" (*Smith* v. *California*, *supra*, p. 152).

Furthermore, "* * * the question whether a particular work is of that character [i.e., obscene] involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." *Roth* v. *United States*, 354 U. S. 476, 497-498 (1957) (Harlan, J., concurring). See also *Feiner* v. *New York*, 340 U. S. 315, 316 (1951); *Watts* v. *Indiana*, 338 U. S. 49, 51 (1949); *Norris* v. *Alabama*, 294 U. S. 587, 589-590 (1935); *People* v. *Richmond County News*, 9 N. Y. 2d 578, 580 (1961).

Such a "sensitive and delicate" judgment is one that must be made by the courts in accordance with the requirements of due process of law. *Manual Enterprises, Inc.* v. *Day*, U. S. , 8 L. ed. 2d 639, 647 (June 25, 1962); *Grove Press, Inc.* v. *Christenberry*, 276 F. 2d 433, 436 (2d Cir. 1960); *Roth* v. *United States*, *supra*, pp. 488-489; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441-443 (1957).

Mr. Justice Harlan, in announcing the judgment of this Court in *Manual Enterprises, Inc.* v. *Day*, *supra*, emphasized the foregoing principle in his opinion, joined in by Mr. Justice Stewart, as follows:

> "That issue, [i.e. 'obscenity] involving factual matters entangled in a constitutional claim, see *Grove Press, Inc.* v. *Christenberry* (CA 2 N. Y.) 276 F. 2d 433, 436, is ultimately one for this Court."

It follows, therefore, that no state possesses the power to suppress or limit the circulation of any book until *there has first been a determination by a court* of competent jurisdiction, in accordance with the requirement of due process, *that such book is obscene* within the definition laid down in *Roth* v. *United States*, *supra*.

This was well expressed in *New American Library of World Literature, Inc.* v. *Allen*, 114 F. Supp. 823, 834 (1953), where the District Court stated:

> "Until a court of competent jurisdiction adjudged a work to be obscene * * *, there would exist no warrant in law for its suppression."

It further follows that any censorship method devised by a state which results in the suppression or limitation of the circulation of any book prior to such a judicial determination that such book is obscene, violates the con-

stitutional rights of the publisher, the bookseller and the public in general.

In point of fact, wherever any such method of censorship has been devised by any state or state agency, based upon implied threats of criminal prosecution, such method has been struck down by the courts as violating the First Amendment. *Sunshine Book Co. v. McCaffrey*, 4 A. D. 2d 643, 647 (N. Y. 1957); *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292 (1953), modified 14 N. J. 524 (1953); *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823 (1953); *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479, 482 (1921); *HMH Publishing Co. v. Garrett*, 151 F. Supp. 903 (1957); *Random House, Inc. v. City of Detroit*, et al., unreported, File No. 555 684, Cir. Ct. Wayne County, Mich. (March 29, 1957 on preliminary injunction; June 16, 1958 on permanent injunction). A copy of the opinion on the preliminary injunction is annexed hereto as Appendix A.

Illustrative of the last cited authorities is *Sunshine Book Co. v. McCaffrey, supra.* In that case, the defendant, the License Commissioner of New York City, had issued a letter to all licensed newsdealers threatening to institute proceedings to revoke or suspend the licenses of those dealers who did not discontinue the sale of certain magazines listed in his letter. The basis for the Commissioner's letter was the alleged obscenity of the listed magazines. The plaintiff in that case was the publisher of several of the magazines.

The Appellate Division of the New York Supreme Court reversed the lower court and granted an injunction directing the License Commissioner to recall his letter and to instruct the newsdealers to disregard it. In the course of its opinion the Court said at page 647:

> "Even as we would not hesitate to strike down a palpable attempt to violate those guarantees [free-

> dom of speech and press], so, by the same token, are we constantly vigilant against any indirect encroachments, however subtle, which result in censorship. Courts have condemned informal methods of censorship which were attempted by threats of criminal prosecution (*Bantam Books* v. *Melko*, 25 N. J. Super. 292, mod. 14 N. J. 524; *New Amer. Lib.* v. *Allen*, 114 F. Supp. 823; *Dearborn Pub. Co.* v. *Fitzgerald*, 271 F. 479, 482)."
>
> • • • • •
>
> "The existing statutes afford means to law enforcement officials for dealing with obscene literature and publications. New methods which meet constitutional standards may be devised in the future by the Legislature. We cannot predict what forms these may take. The human mind is fertile and necessity promotes ingenuity. *But whatever means may be taken to stamp out the pernicious evil of obscenity, they must conform with, and respect, the constitutional guarantees of free speech and freedom of the press. We cannot countenance encroachments upon those rights by censorship by an administrative official.* To permit that would be to inject the unwholesome effects which the uncompromising rule against prior restraint was calculated to prevent." (pp. 648-649) (Italics supplied.)

Chief Justice Warren gave eloquent expression to this principle in his concurring opinion in *Roth* v. *United States*, *supra*, where he said at page 495:

> "• • • To recognize the existence of a problem, however, does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of

> the past prove that there is a strong countervailing interest to be considered in the freedoms guaranteed by the First and Fourteenth Amendments."

The most recent pronouncement of this basic doctrine was made by Mr. Justice Brennan in his opinion (joined in by Chief Justice Warren and Mr. Justice Douglas) concurring in the reversal in *Manual Enterprises, Inc.* v. *Day*, *supra*. Mr. Justice Brennan said (8 L. ed. 2d at p. 652):

> "We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged. *Marcus* v. *Search Warrant of Property*, 367 U. S. 717; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436; see also *Smith* v. *California*, 361 U. S. 147."

II

RESOLUTION NO. 73, AS AMENDED, IS UNCONSTITUTIONAL. BY REASON OF ITS IMPLICIT THREAT OF PROSECUTION, IT HAS THE TENDENCY TO AND, IN FACT, DOES INHIBIT THE DISSEMINATION OF BOOKS IN RHODE ISLAND WITHOUT PRIOR JUDICIAL DETERMINATION THAT THEY ARE OBSCENE.

In violation of the fundamental principles set forth in our Point I, the uncontradicted facts established at the trial clearly show that the effect of the adoption of Resolution No. 73, as amended, and of the acts and practices engaged in by the Commission in purported compliance with its duties under that Resolution has been to suppress the circulation of books in Rhode Island *without any prior judicial determination* as to the obscenity of these books.

Resolution No. 73, as amended, states that it shall be the duty of the Commission "to educate the public con-

cerning any book * * * containing obscene, indecent or impure language, * * * and to investigate and recommend the prosecution of all violations of said sections, * * *."

Any such "education" of the public by the Commission concerning any book containing obscene language, whether by advice, information, list, notice or otherwise—by the very language of the Resolution—constitutes an implicit threat that unless there is cessation of sale by booksellers of that book, the booksellers would be prosecuted criminally.

Such threat results from the fact that, pursuant to Resolution No. 73, as amended, the Commission's duty to "educate the public" concerning any "book * * * containing obscene, indecent or impure language" is implemented by the duty to recommend prosecution of the booksellers for alleged violation of Chapter 11-31 of the General Laws of Rhode Island entitled "Obscene and objectionable publications and shows", which, among other things, makes it a criminal offense for any person to import, print, publish, sell, lend, give away, advertise for sale, or distribute any "book * * * containing obscene, indecent or impure language".

Although Justice Mackenzie stated that he felt that it would be better practice for the Supreme Court of Rhode Island, as the highest Court of that State, to pass upon the constitutionality of the Resolution (R. 122), he expressed his own opinion as follows:

> "It appears to this Court that there is considerable doubt as to the constitutionality of the Resolution itself. The resolution is so drafted that the entire matter of educating the public concerning any book which the Commission determines to be obscene appears to contain within it the implicit threat of criminal prosecution for those who refuse to heed the decision which has been made by a majority of the Commission. Because of such threat of criminal

> prosecution, the inevitable result is the suppression of books without a judicial determination as to whether or not they are obscene. *The effect of the Resolution, then, is to appoint the members of the Commission as censors and to give them the power to determine which books and magazines will be distributed and sold in Rhode Island*" (Italics supplied) (R. 120).

We submit that what was said by this Court in *Smith* v. *California*, *supra*, with respect to another statute, is here equally applicable. This Court there said at page 154:

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

And at page 155:

> "It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution."

Just as in the case of *Smith* v. *California*, *supra*, so here, the impending threat of prosecution caused by the Resolution results in booksellers becoming self-censors and thereby impedes the circulation of books even though such books may be within the protection of the First Amendment.

III

THE APPELLEES, BY THEIR ACTS IN SENDING THE NOTICES TO BOOKSELLERS, MADE EXPLICIT THE THREAT OF PROSECUTION IMPLIED IN RESOLUTION NO. 73 AS AMENDED. SUCH ACTS ARE THEREFORE UNCONSTITUTIONAL.

The Commission made explicit the implicit threat of prosecution conveyed by Resolution No. 73, by the notices which it sent to booksellers. Thus, in its notice of July 19, 1957 (Pet. Ex. 1; R. 19, 55-56) the Commission stated:

> "The Chiefs of Police have been given the names of the aforementioned magazines with the *order* that they are not to be sold, distributed or displayed to youths under eighteen years of age.
>
> *The Attorney General will act for us in case of non-compliance.*" (Italics supplied.)

In Petitioners' Exhibit 11 (R. 23, 76), an undated notice sent by the Commission in 1958, the following statement appears:

> "Cooperative action will *eliminate* the necessity of our recommending prosecution to the Attorney General's department."

With respect to these two exhibits Superior Court Justice Mackenzie aptly commented in his opinion as follows:

> "Petitioners' Exhibit '1' also states:
>
> "'The Attorney General will act for us in cases of non-compliance'.

What can these words possibly mean to the distributor? They can only mean:

> 'If you fail to comply with this letter by removing from circulation those magazines or books listed herein, you will be prosecuted by the Attorney General.'

This Court can find no other reasonable interpretation of that language.

Language in other notices (e.g. Petitioners' Exhibit '11') carries the same threat in the following language:

> "* * * Cooperative action will eliminate the necessity of our recommending prosecution to the Attorney General's department'." (R. 118).

In addition, as the numerous exhibits establish, and as was testified upon the trial by Appellee McAloon, copies of the various notices issued by the Commission were sent to the Chiefs of Police throughout Rhode Island. In fact, the witness Kaplan (Silverstein's manager) testified that shortly after the receipt of a notice from the Commission, a request was received from a member of the Providence Police Department for a report as to what Silverstein had done with respect to publications distributed by it listed on such notice (R. 26, A. 32).

Under these circumstances, to contend as Appellees did upon the trial, that the stopping of sale of the publications listed in the Commission's notices was "voluntary" on the part of the distributors, is merely engaging in semantics. Particularly is this so in the light of the testimony of Mr. Kaplan that Silverstein, upon receipt of each notice, stopped selling the publications distributed by it listed on such notice and instructed its field men to recall all unsold copies from retail customers because of Silverstein's desire to avoid "the possibility of some sort of a

court action against ourselves, as well as the people that we supply" (R. 25, A. 23-27).

Justice Mackenzie, in rejecting this defense, made the following comments:

> "To say that the action taken by the distributors was voluntary is unrealistic. Here we have notices sent out on letterheads entitled RHODE ISLAND COMMISSION ON YOUTH informing the distributor that this official, public agency, 'established by legislative order in 1956' (Petitioners' Exhibit "1") had made a finding that certain books and magazines being sold and delivered by the distributor were completely objectionable and that this official Commission had already informed the Chiefs of Police that those books and magazines listed in this particular notice are not to be sold.
>
> 'The Chiefs of Police have been given the names of the aforementioned magazines *with the order that* they are not to be sold. * * *" (Petitioners' Exhibit 1) (Italics by the Court).
>
> Here is a Commission created by the General Assembly which can give orders to the Chiefs of Police of the various cities and towns. Yet the respondent McAloon would have us believe that the books and magazines were not 'banned' by the Commission, and that the distributors voluntarily cooperated with the Commission. *The effect of the notices sent out by the Commission was clearly intimidation*" (R. 117-118). (Italics supplied.)

The Commission's own minutes clearly negate the contention advanced at the trial by Appellee McAloon that the Commission by its activities did not "ban" any books, but rather, that the booksellers' stoppage of sale was a voluntary act.

Thus, the minutes of the Commission's meeting of October 9, 1957 read in part as follows:

> "Father Flannery suggested that for the next meeting, Mr. McAloon try to find out what percentage of the books that are given to them are sold from the time they receive them, until the time the police get around.
>
> * * *. Father Flannery noted that he had been called about magazines *proscribed* by the Commission remaining on sale after lists had been sent (sic) to distributors and police, to which Mr. McAloon suggested that it could be that the same magazines were seen, but that it probably was not the same edition proscribed by the Commission.
>
> Father Flannery questioned the state-wide compliance by the police, or anyone else, *to get the proscribed magazines off the stands*. Mr. McAloon showed the Commissioners the questionnaires sent to the chiefs of police from this office and returned to us" (Resp. Ex. C; R. 50, 111). (Italics supplied.)

Appellee Flannery's statement as above set forth and particularly the use by him and by Appellee McAloon of the word "proscribed" is cogent proof how "voluntary" was the booksellers' compliance with the Commission's notices!

The minutes of the Commission's meeting of October 23, 1957 are equally probative and illustrative of the pressure applied by the Commission to effect the stoppage of sale of books listed on its notices. The minutes of that meeting read in part as follows:

> "Though Peyton Place, authored by Grace Metallious, has been voted objectionable by a majority of the Commission for sale, distribution or display for youths under 18 years of age, the Chairman remarked that a Mr. Horan, Director of the Rhode Island Training School for Boys, had

purchased a copy from the Garden City, Cranston, Rexall Drugstore this date and that the rack was well stocked. *Mr. Sullivan suggested calling the Cranston Chief of Police to inquire the reason Peyton Place was still being sold, distributed and displayed since the Police departments had been advised of the Commission's vote. If no action is taken; the next move would be to talk with the Attorney General's Office.*" (Resp. Ex. B; R. 50, 107) (Italics supplied.)

In reversing Justice Mackenzie the Supreme Court of Rhode Island, in its majority opinion, said,

> "We have no difficulty in declaring the resolution constitutional. On its face it does not authorize previous restraint of freedom of the press. It does not confer on the commission any official power to regulate or supervise the distribution of books or other publications. The functions conferred are solely educative and investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth. The commission cannot lawfully *order* anyone to comply with its conclusions regarding the objectionable nature of a publication which it has officially investigated.
>
> Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission. He may treat them as of no more binding force than similar suggestions of an unofficial group. Indeed each is on a par with the other. The mere fact that the commission may recommend prosecution does not alter the case. They cannot *order* prosecution; that judgment is solely with the attorney general. Any unofficial group may do as much in this respect as the commission" (R. 132).

We submit that the rationale of the Rhode Island Supreme Court completely ignores the realities of the situation. Whether or not the Commission has the legal power to order prosecution is not material. What is material, we submit, is that the Resolution itself, conferring upon Appellees, the members of an official state commission, the statutory power to recommend prosecution under the obscenity laws, has the tendency, and, in fact, has had the actual effect, of inhibiting the circulation of books without prior judicial determination that such books are obscene.

The Rhode Island Supreme Court states that a bookseller is free to treat the Commission's Notices "as of no more binding force than similar suggestions of an unofficial group." Why, then, does Resolution No. 73, as amended by Resolution No. 95, contain the specific power to *recommend prosecution?* Does not any citizen, or "unofficial group" have the right to recommend to the prosecuting authorities that a bookseller be prosecuted for violating the obscenity laws without any specific statutory provision? It seems obvious that here the statutory provision was inserted to accomplish the very purpose which it actually did accomplish, viz., to intimidate the booksellers into compliance with the Commission's notices and thereby circumvent the basic principle that by reason of the First Amendment, no book may be suppressed without prior judicial determination that it is obscene.

Nor is there any validity to the Rhode Island's Supreme Court's statement that "Unless and until such publication is judicially determined to be obscene the distributor may with impunity refuse to respond to any suggestions of the commission" (R. 132) or its further statement: "He was free to disregard their request for cooperation and if he did so he had nothing to fear except prosecution for violating G.L. 1956, chap. 11-31" (R. 134).

A complete answer to this argument was given by the Court in *American Mercury, Inc. v. Chase*, 13 F. 2d 224, 225 (1926), as follows:

> "Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

Conclusion

We submit that the Rhode Island Legislature, in adopting Resolution No. 73, as amended, and the Appellees, in proceeding as they did under that Resolution, ignored the fundamental precept stated by this Court in *Marcus v. Search Warrant of Property*, 367 U. S. 717 (1961). This Court there said (p. 731):

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity • • • without regard to the possible consequences for constitutionally protected speech."

For, as has been shown above, as a result of the Resolution, and the activities of the Appellees thereunder, Appellants Bantam Books, Inc. and Dell Publishing Company, Inc. have been denied the right to circulate certain books published by them, and all the Appellants are constantly subject to the threat of being deprived of their right to circulate books in Rhode Island, and booksellers of their right to sell such books. In addition, the public

of Rhode Island has been deprived of the right to read certain books and, so long as Resolution No. 73 remains in effect, is constantly subject to deprivation of the freedom to read. Such deprivation has been accomplished and is threatened to be accomplished without any prior judicial determination that the books involved are obscene. Rather the determination takes the form of a pre-judgment by the Appellees—in most cases by a majority—based upon unknown standards.

For the reasons above set forth, it is urged that

(a) Resolution No. 73 of the Acts and Resolves of 1956 of the Rhode Island General Assembly, as amended by Resolution No. 95 of the Acts and Resolves of 1959 should be declared unconstitutional.

(b) The judgment of the Superior Court of Rhode Island entered on January 18, 1962 should be reversed and Orders Nos. 2 and 3 of the judgment of that Court entered on March 2, 1961 should be reinstated;

Respectfully submitted,

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APPENDIX A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 555 684

RANDOM HOUSE, INC., a New York corporation,

Plaintiff,

vs.

CITY OF DETROIT, a Municipal corporation, CITY OF DETROIT METROPOLITAN POLICE DEPARTMENT, EDWARD S. PIGGINS and MELVILLE E. BULLACH,

Defendants.

OPINION

This action is brought by plaintiff for a permanent injunction (1) directing defendants to withdraw the ban against the sale in Detroit of the hard-bound edition of the book TEN NORTH FREDERICK; (2) enjoining defendants, their agents and subordinates, from directly or indirectly ordering any person engaged in the sale of the book to discontinue sale thereof, and from making any threat of prosecution, explicit or implicit, to any person selling the book by reason of their sale, distribution or display for sale thereof; the aforesaid relief, however, not to impose any restraint upon defendants' lawful duties of law enforcement by prosecution.

The matter is before the Court on an application for a preliminary injunction.

Appendix A

There is no dispute as to the facts. Plaintiff, a New York corporation, in 1955 published the hard-bound edition of the book TEN NORTH FREDERICK. The book was awarded the National Book Award as being the outstanding novel of 1955 and was on the national best seller lists for 32 weeks. Plaintiff has sold in excess of 100,000 copies of the book throughout the United States.

Defendant Piggins is the Chief of Police of the City of Detroit, and defendant Bullach is an Inspector and Head of the Censor Bureau of said Police Department. In or about the middle of January, 1957 defendant Piggins made a public announcement to the effect that the book TEN NORTH FREDERICK was obscene and thereafter defendant Bullach notified booksellers in the City of Detroit that the sale of the book would lead to arrest and prosecution. Since then the book has not been sold by booksellers in the City of Detroit.

Plaintiff contends that the foregoing acts on the part of defendants Piggins and Bullach were in excess of the authority conferred upon them by law and constituted an illegal banning and suppression of the book TEN NORTH FREDERICK, as a result of which plaintiff has been irreparably injured in violation of its constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. Defendants, on the other hand, contend that they acted within the statutory powers conferred upon them by the Michigan state statute and the Detroit municipal ordinance, both prohibiting the sale of obscene publications.

This Court is constrained to disagree with the defendants' position. We are here dealing with the precious constitutional right of a free press.

"Freedom of the press is not limited to freedom to publish, but includes the liberty to circulate publications, which the Supreme Court has said 'is as essential to that freedom as liberty of publishing.' Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 669, 82 L. Ed. 949. In the Lovell case the court again stressed the importance of protecting freedom of the press 'from every sort of infringement'. See also Near v. State of Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 233, 56 S. Ct. 444, 80 L. Ed. 660; De Jonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278. Freedom of the press, together with freedom of speech and freedom of religion, occupy a 'preferred position' among our constitutional guaranties. Marsh v. State of Alabama, 1946, 326 U. S. 501, 509, 66 S. Ct. 276, 90 L. Ed. 265; Jones v. City of Opelika, 1943, 319 U. S. 103, 63 S. Ct. 890, 87 L. Ed. 1290; Murdock v. Com. of Pennsylvania, 1943, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292; Martin v. City of Struthers, 1943, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1313. That preferred position gives these guaranties 'a sanctity and a sanction not permitting dubious intrusions.' Thomas v. Collins, 323 U. S. 516, at page 530, 65 S. Ct. 315, 89 L. Ed. 430 * * *. Censorship in any form is an assault upon freedom of the press. A censorship that suppresses books in circulation is an infringement of that freedom." (*New American Library of World Literature, Inc.* v. *Allen*, 114 F. Supp. 823, 832, 833; U. S. Dist. Ct., N.D. Ohio, E. D. 1953.)

Neither the Michigan statute nor the Detroit municipal ordinance, under which defendants have claimed to act, clothed defendant Piggins, as Police Chief of the City of Detroit, or defendant Bullach, as Head of the Censor Bureau, with power to censor or ban the sale of any books.

Appendix A

The sole authority granted to defendants Piggins and Bullach under the Michigan statute or the Detroit ordinance is to order the arrest of any person selling a book where there is probable cause that such sale violates the obscenity laws. In the event of such an arrest, it would then devolve upon a court of competent jurisdiction to determine whether or not the book violates the obscenity statute or ordinance, thus guaranteeing a judicial determination in accordance with the constitutional requirements of due process. If, after such a judicial determination, the book were found to be obscene, a legal ban on its sale would then ensue. Here, however, defendants Piggins and Bullach have circumvented the judicial process and have effected such ban upon the sale of the book by their non-judicial determination that the book is obscene, their announcement of the fact, and their notifying booksellers that the sale of the book would lead to prosecution. Such conduct on the part of said defendants is beyond the scope of their lawful authority and violates plaintiff's constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States.

In a similar situation (*New American Library* v. *Allen*, *supra*, pp. 833, 834) the United States District Court of Ohio issued an injunction against the Police Chief of the City of Youngstown. The Court there said:

> "The defendant was without authority to censor books. Such a drastic power can be vested in a police officer only by a valid express legislative grant. As Chief of Police it was defendant's duty to examine the suspected publications to determine whether there was probable cause for prosecution. He was without authority to determine with finality

> whether the books were obscene or immoral in violation of the ordinance. In the event prosecutions were undertaken, the burden would rest upon the city officials to establish by proof beyond a reasonable doubt every element of the offense, including the obscene or immoral nature of the books. Until a court of competent jurisdiction adjudged a book to be obscene or immoral, there would exist no warrant in law for its suppression."

In *Dearborn Pub. Co.* v. *Fitzgerald*, 271 Fed. 479, Federal Judge Westenhaver issued an injunction against the Mayor and Chief of Police of Cleveland who were acting under color of an ordinance proscribing the sale of obscene and scandalous literature. Judge Westenhaver there said (p. 482):

> "The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene or scandalous; but, if it were, the limit of the city's power would be to conduct the prosecution for the specific offense thus committed, * * *."

See, also, *Bantam Books, Inc.* v. *Melko*, 25 N. J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N. J. 524, 103 A. 2d 256.

Nor can defendants Piggins or Bullach successfully argue that their conduct did not constitute a banning of the book. The fact remains that after these defendants made their announcement that the book is obscene and notified booksellers that its sale would subject a seller to prosecution, booksellers in Detroit stopped selling the book. To say that such stoppage of sale, in the light of defendants' announcement and notification, was a *voluntary* act on the part of booksellers is to fly in the face of realism.

Appendix A

Like arguments have been struck down by the courts. In *Bantam Books, Inc.* v. *Melko, supra,* the Court said:

> "Defendant prosecutor argues that his letters cannot be construed as an order banning the sale of *The Chinese Room* in his county, or that they were in fact a ban on such sale. The contention is naive • • •. True, as the prosecutor says by way of defense, there was no actual compulsion or threat, in words, but such was the very real impact and effect of his letters. They were enough to bring about the result he and his committee desired. They did what they were intended to do. The distributors were quick to obey, for they had plenty of other books to sell and were anxious lest the pattern of Middlesex County's action spread to other counties and markets. The plain fact of the matter is that not a single copy of *The Chinese Room* was sold in Middlesex County after the prosecutor's letters were received."

Similarly, in *American Mercury, Inc.* v. *Chase,* 13 F. 2d 224, 225, the Court said:

> "Few dealers in any trade will buy goods after notice that they will be prosecuted if they resell them. Reputable dealers do not care to take such a risk, even when they believe that prosecution would prove unfounded. The defendants know this and trade upon it. They secure their influence, not by voluntary acquiescence in their opinions by the trade in question, but by the coercion and intimidation of that trade, through the fear of prosecution if the defendants' views are disregarded."

Defendants have urged as an additional defense to this motion that the book TEN NORTH FREDERICK is obscene. The question of the obscenity or non-obscenity of the book

is not involved in this case. Plaintiff's right to an injunction does not depend upon the contents of the book. Plaintiff's right stems from the fact that these defendants have illegally banned the sale of plaintiff's book by exercising powers beyond those delegated to them by the statute and ordinance under which they acted.

It is fundamental that equity will intervene to prevent an official from transcending his power where, in so doing, he causes or threatens to cause irreparable injury to property or civil rights.

This principle was forcibly expressed by Federal Judge McNamee in *New American Library* v. *Allen*, 114 F. Supp. 823, 831 (U. S. Dist. Ct., N. D. Ohio, E. D. 1953), as follows:

> "Where public officers, charged with the enforcement of a valid criminal law exceed their lawful powers and by arbitrary action cause or threaten to cause irreparable injury to property rights or civil rights of the complainant, equity will intervene. 28 Am. Jr. 373, Sec. 185; id. 421, Sec. 238; 43 C.J.S., Injunctions, Sec. 111, p. 634."

See also:

Wetherby v. *City of Jackson*, 264 Mich. 146, 249 N. W. 484, 485.

Grosse Pointe Fire Fighters Ass'n v. *Village of Grosse Pointe Park*, 303 Mich. 405, 6 N. W. 2d 725, 727.

Bantam Books, Inc. v. *Melko*, 25 N. J. Super. 292, 96 A. 2d 47, mod. on other grounds 14 N. J. 524, 102 A. 2d 256.

Dearborn Pub. Co. v. *Fitzgerald*, 271 Fed. 479.

Appendix A

Plaintiff has been deprived of a property right without due process of law. It has suffered loss incapable of accurate measurement in an action at law. Accordingly, plaintiff has sustained irreparable injury and is threatened with further loss.

For the reasons above set forth, the Court holds that the conduct of defendants Piggins and Bullach in ordering the suppression of plaintiff's book under threat of arrest and prosecution of the booksellers was in excess of their lawful powers under the Michigan statute and the Detroit ordinance. An order may be entered herein restraining the defendants, pending the trial of this action, from engaging in such unauthorized conduct. No restraint, however, is imposed upon defendants' power to enforce the statute of the State of Michigan or the ordinance of the City of Detroit by prosecution.

/s/ Carl M. Weideman
Circuit Judge

Mar. 29, 1957

A True Copy

Edgar M. Branigin
Clerk